No. 21,928

United States Court of Appeals

For the Ninth Circuit

ERNEST DOUGLAS BREDE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California

REPLY BRIEF FOR APPELLANT

CLARK A. BARRETT,
315 Montgomery Street,
San Francisco, California 94104,
Counsel for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Argument	1
I. The government in its responsive brief does not deny the fundamental facts warranting reversal of the conviction	1
II. The government in its responsive brief has misquoted the record	3
III. The government in its responsive brief has failed to comment on, or distinguish, any of the cases cited by appellant	4
IV. The appellee makes unsupported assertions concerning the significance of the sending of the "current information questionnaire"	6
V. This court, and others, have heretofore held that a specific, valid order must have been made to support a criminal prosecution	7
VI. The government is contending that it should not be required to follow the clear mandate of its own regulations; its argument should be addressed to Congress or the executive branch rather than to this court	11
Conclusion	12

Table of Authorities Cited

Cases

	Pages
Chernekoff v. United States, 219 F.2d 721 (9th Cir. 1955)	7
Kent v. U.S., 207 F.2d 234 (9th Cir. 1953)	5
United States v. Anthony Rotella, D.C. E.D. N.Y., 67 C.R. 122 (Feb. 1, 1968)	9
U.S. v. Lawson, 337 F.2d 800 (3rd Cir. 1964), cert. den. 380 U.S. 919 (1965)	5
Yaich v. U.S., 283 F.2d 619 (9th Cir. 1960)	4

Regulations

32 C.F.R.:	
Section 1604.59	5, 8
Section 1660.20(d)	5

No. 21,928

United States Court of Appeals

For the Ninth Circuit

ERNEST DOUGLAS BREDE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California

REPLY BRIEF FOR APPELLANT

ARGUMENT

I. THE GOVERNMENT IN ITS RESPONSIVE BRIEF DOES NOT DENY THE FUNDAMENTAL FACTS WARRANTING REVERSAL OF THE CONVICTION.

Appellant submits that the judgment and conviction *must be reversed* because of the following six propositions, none of which has been, or can be, controverted by the Government:

1. Appellant did not commit any criminal act unless he violated a "duty" imposed upon him by the Universal Military Training and Service Act.

2. The only "duty" which Appellant allegedly violated was an alleged specific order of his local board

to report to the board for instructions to proceed to a place for civilian employment in lieu of induction.

3. *Express, mandatory* provisions of the Selective Service Regulations *require* the local board *members* to make such an order.

4. The local board members did not have authority or jurisdiction to make such an order on March 14, 1966. Therefore, no order was made at that time.

5. The local board members first had authority and jurisdiction to make such an order on April 20, 1966, when they received specific approval from the National Director of Selective Service to do so.

6. After receiving authority to make such an order, the local board *did not meet* and *did not in fact order* the Appellant to report for civilian work.

The Government is basing its case on the following contentions, none of which has any legal merit:

1. It is immaterial that the local board members never ordered the Appellant to report for civilian work.

2. It is immaterial that express, mandatory provisions of the regulations were violated.

3. Any clerical person in the local board office may *sign* and *mail out* purported orders, even though the orders have not been *issued* by the local board, and yet such "orders" are just as valid as if all legal requirements had been complied with.

4. The presumption of innocence notwithstanding, a citizen of the United States *should be convicted of*

disobeying an order that was never made, as he probably would have violated it if it were made.

5. The fact that the *fundamental basis* of the alleged crime is missing is immaterial; if there were error, it is not prejudicial because the Appellant would have disobeyed a valid order anyway.

II. THE GOVERNMENT IN ITS RESPONSIVE BRIEF HAS MISQUOTED THE RECORD.

On page 5 of its brief, the Appellee in its "Statement of Facts" recites as follows:

> "At the conclusion of the meeting, therefore, the local board reviewed appellant's file, determined that work as an institutional helper at the Los Angeles County Department of Charities was available, was appropriate, and *was to be performed by the appellant* (Exhibit, pp. 12, 52)." (Emphasis supplied by Appellee)

This is an absolute misstatement of the record. At page 52 of the Selective Service File (Exhibit 1) the minutes of the local board meeting on March 14, 1966 state:

> "The local board determined that work as an institutional helper at Los Angeles County Department of Charities, 1200 North State Street, Los Angeles, California 90033 *is appropriate to be performed* by the registrant and such work is available."

It should be noted that the minutes do *not* indicate, as Appellee contends, that the work was to be *per-*

formed by the Appellant, but only that the work was "appropriate" and "available".

The summary of the minutes which appears on page 12 of the File merely omitted the word "appropriate", but cannot supersede the more complete exposition of the minutes on page 52.

In numerous other instances throughout its brief, the Appellee begs the very question in issue by assuming that a valid order was issued on April 20, 1966, when the fact of issuance by the local board members is one of the principal points raised by the Appellant. See pages 6, 11, 13 and 14 of Appellee's brief.

III. THE GOVERNMENT IN ITS RESPONSIVE BRIEF HAS FAILED TO COMMENT ON, OR DISTINGUISH, ANY OF THE CASES CITED BY APPELLANT.

Nowhere in its brief does the Appellee attempt to demonstrate that the cases cited by Appellant on pages 23, 29 and 30 of his brief are not the determinative law on the questions involved herein, or that they do not require the relief sought herein by the Appellant.

The Government has cited but three cases, none of which are applicable here. In *Yaich v. U.S.*, 283 F.2d 619 (9th Cir. 1960), this Court held that a mere technical error or omission on the part of the local board or its clerical personnel would not be sufficient to warrant reversal of a conviction if there was no prejudice to the Appellant. In this case, however, the

error involves, not a minute technicality, but the fundamental basis of the indictment—that is, whether any order was ever issued by the members of the local board.

The other two cases cited by Appellee, *Kent v. U.S.*, 207 F.2d 234 (9th Cir. 1953) and *U.S. v. Lawson,* 337 F.2d 800 (3rd Cir. 1964), Cert. denied 380 U.S. 919 (1965), only relate to the *signing* of an order of the local board *after* the order was *validly issued* by the local board itself. Therefore, Appellee has cited *no authority* to the effect that a local board may delegate the *issuing* of orders, as distinguished from the signing or mailing of them. As pointed out in Appellant's opening brief, page 27, Section 1604.59 of the Selective Service Regulations expressly provides that: "official papers *issued by a local board* may be *signed* by the Clerk of the local board if he is authorized to do so by resolution duly adopted by and entered in the minutes of the meetings of the local board . . ."

Nowhere in the regulations is there *any* provision that the local board may *delegate* the *issuance* of orders.

Webster's Dictionary defines "issue" as "to go forth by authority". In this case, there was *no authority* given by the local board members to their Clerk to *make* an order, but only to *sign* orders which the local board itself had made.

The Government would have this Court believe that the requirements of Regulation 1660.20(d) requiring the National Director to approve the civilian work

selected by the local board is but a meaningless formality.

The National Director, however, has the power both to approve and *disapprove* the work suggested by the local board. It is for this reason that the local board does not have authority or jurisdiction to order a registrant to perform civilian work in lieu of induction until it has received the National Director's approval in this regard.

IV. THE APPELLEE MAKES UNSUPPORTED ASSERTIONS CONCERNING THE SIGNIFICANCE OF THE SENDING OF THE "CURRENT INFORMATION QUESTIONNAIRE."

At page 14 of its brief, Appellee would have this Court believe that the sending of a "Current Information Questionnaire" was "apparently customary procedure". There is not a scintilla of documentary or testimonial evidence in this case which would establish such a contention. The record is void in this respect. Further, Appellant believes that the Government will not deny that the usual and customary procedure after a meeting of the nature of that held on March 14, 1966 is the sending of a "C-140" form, advising the registrant that any new information which he may have presented to the board at that time was not considered sufficient for reopening or reclassification. Therefore, the sending of the "Current Information Questionnaire" (F 53-54) in this case was *not* customary, and the fact that the Appellant was ordered to return it "at once" further indicates that this was not a routine mailing. Therefore, the local

board, not the clerk, should have weighed the new evidence submitted.

V. THIS COURT, AND OTHERS, HAVE HERETOFORE HELD THAT A SPECIFIC, VALID ORDER MUST HAVE BEEN MADE TO SUPPORT A CRIMINAL PROSECUTION.

In *Chernekoff v. United States*, 219 F.2d 721 (9th Cir. 1955), this Court reversed a conviction for refusal to submit to induction as the defendant was never given a specific order. At page 724 thereof this Court stated:

> "Reversal is also required because the appellant never refused to be inducted into the Armed Forces in the manner required by the law in order to warrant prosecution . . . the appellant was not given the prescribed opportunity to step forward, nor the prescribed warning. The Army deemed it useless to apply the Special Regulation to the appellant as he had said he would not if asked to so do step forward and become inducted into the Armed Forces. It does not matter that he might not have changed his mind. He should have been given the opportunity granted him by the Army's own regulation to seriously reflect and to let actions speak louder than words . . . The appellant could well have changed his mind and complied with the 'step forward' procedure had the Special Regulation been followed or 'stood in his tracks' if he desired to adhere to his former statement . . . We hold that . . . appellant was not given a definite opportunity to be inducted or refuse to be inducted at the time provided for induction and that he did nothing to make such opportunity impossible or unnecessary."

In the *Chernekoff* case, the failure of the Government authorities to issue *a specific order directing induction* was held to be a basis for acquittal; similarly, in the present case, *the failure* of the *members* of the local board *to make an order to report for civilian work is similarly defective.*

A further analogy would be presented by the situation in which a Grand Jury did not vote for an indictment, but the foreman nevertheless signed a document purporting to be an indictment. Could any serious contention be made that this was not a material error, or a complete defense to the purported indictment? Would the United States then contend that this was a "mere procedural error", as the Grand Jury would undoubtedly have voted the indictment in any event? The defendant submits that *this is not a procedural technicality that was not prejudicial to the defendant, but rather that it goes to the essence of due process and the question of whether a crime has been committed.* Needless to say, if there is *any* reasonable doubt, the doubt should be resolved in favor of the criminal defendant.

Various cases have held that *if there were a proper order by members of a local board,* the signing of it by an assistant clerk, or coordinator, rather than by the clerk of the board, was merely a ministerial act, and not prejudicial to the defendant even though this constituted a violation of Section 1604.59 of the Regulations. However, the *converse* cannot be true—that is, that the *signing* by a *clerk* makes action by the board *members* unnecessary.

More recently, in *United States v. Anthony Rotella,* District Court, Eastern District of New York, 67 C.R. 122 (February 1, 1968) the issue was whether the defendant had been ordered to report to particular hospital work when he reported to his local board for instructions. In granting the defendant's motion for judgment of acquittal, District Judge Weinstein stated as follows:

> "It seems to me very hard to charge a man in an indictment with *failing to obey the order which was never given,* and since at least on this issue I think that the general criminal rule with respect to reasonable doubt governs, *if there is a reasonable doubt about whether he was in fact given the order* and whether following the order he did fail to respond with requisite bad intent, *then it would seem to me that he must be acquitted.*"
>
> "That seems to me to be very much like *Chernikoff,* which is 219 F. 2d 721, where the Defendant took the same position, and apparently the Army didn't ask him to take a step forward, and the Court says that that indicates he didn't disobey an order."
>
> "Now I don't know what was in this man's mind and I don't think its vital to this case, because what is vital to it is that the Selective Service forms require that he proceed to the place of employment pursuant to instructions, and it's got to be pursuant to instructions."
>
> "Now whether those instructions need only be 'Report to this place,' or whether they have to go into detail I don't have to decide now, because he wasn't given any instructions at all so far as this evidence shows."

"Well I think that's what happened: They thought it was useless, but the technical problem is *you can't be accused of violating an order if you are not given the order.* You may be accused of having an intent to violate, but I suppose even in the Army if somebody says 'if that lieutenant gives me an order I'm not going to do it, I'm not going to do what he says,' and the lieutenant then says 'I'm not going to give him the order because it's useless,' he can't then be accused of violating the order that wasn't given."

"He can be accused of other things, but not of violating the order that wasn't given."

"It seems to me that he is not guilty unless he is ordered, and that's what disturbs me."

"And then there must be a record made right then and there that this fellow was ordered and didn't do it. It's probably repeated to him so he is under no illusion as to what he is to do. Because *that is the critical jural step that marks this man as either a law-breaker or not,* and that jural step cannot be ignored, it is critical."

"On the basis of the evidence before me I have a reasonable doubt as to whether he was ever ordered to report to Kings Park State Hospital after he reported to the local board at 9:00 a.m. on the 3rd day of May, 1966 or in the words of Form 153, whether he was ordered 'to proceed to the place of employment pursuant to instruction.'

"In view of that reasonable doubt which I entertain in this case I have no alternative but to dismiss the case, and therefore the defendant's motion is granted."

"The defendant is discharged."

VI. THE GOVERNMENT IS CONTENDING THAT IT SHOULD NOT BE REQUIRED TO FOLLOW THE CLEAR MANDATE OF ITS OWN REGULATIONS; ITS ARGUMENT SHOULD BE ADDRESSED TO CONGRESS OR THE EXECUTIVE BRANCH RATHER THAN TO THIS COURT.

In essence, it appears that the Government is contending as follows in this case:

1. We don't have to follow the express, mandatory regulations which require the local board members to issue an order;

2. We don't have to follow our own regulations as to what persons may properly sign orders issued by local boards;

3. The local board may require that a registrant provide new "current information", and yet delegate to the Clerk the question of whether any such new information is worthy of consideration by the local board;

4. The Government does not have to obey the duties imposed upon it by the Act or regulations, but the Appellant must obey them to the letter or be liable for years of imprisonment.

CONCLUSION

Wherefore, the Appellant prays that the judgment of the District Court be reversed and the cause remanded with directions to the trial court to enter a judgment of acquittal and discharge the Appellant.

Dated, San Francisco, California,
March 4, 1968.

Respectfully submitted,
CLARK A. BARRETT,
Counsel for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLARK A. BARRETT,
Counsel for Appellant.